Mohd Bakri @ Bakhari bin Mohd Noor v Ketua Pengarah Insolvensi for the assets and liability of Sykt Taba Silver Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24NCC-1–01 OF 2014
MOHAMED ZAINI MAZLAN JC
22 DECEMBER 2014

Companies and Corporations — Winding up — Disposition of property — Liquidators — Whether there was complete appreciation and disposal of company's assets — Whether sale of company's land grossly undervalued — Whether liquidator pursued company's interests in respect of sale of shares in another company

According to the plaintiff, he had founded Sykt Taba Silver Sdn Bhd ('the company') and was a former director and shareholder of the company. The company was wound up in 1992, where the defendant was appointed as the liquidator. The company had a piece of land ('the land') charged as security to Bank Pertanian Malaysia ('the bank') for a loan of RM750,000. When the company defaulted in the loan, foreclosure proceedings were commenced against it. The bank instructed the defendant to sell the land by way of private treaty to Galeri Tani Sdn Bhd ('Galeri Tani'). Galeri Tani had offered to buy the land for RM800,000 and this was agreed by the defendant. The defendant applied through a summons in chambers for consent to sell the land. The price offered by Galeri Tani was significantly higher than the valuation given by the Valuation Department which was only RM480,000. The plaintiff applied for leave to intervene in the proceedings. Both applications by the defendant and the plaintiff were later withdrawn and the foreclosure proceedings was never concluded. The defendant eventually decided to sell the land by way of tender. The defendant set the reserve price for the land at RM840,000. Proceeds from the sale of the land were used to pay off some of the company's creditors. Some ten years later, the defendant proceeded to make an application in the winding up suit to be released and for the company to be dissolved under s 234 of the Companies Act 1965 ('the CA'). The application was granted. The plaintiff then filed this application pursuant to s 307 of the CA for leave to file the originating summons out of time.

Held, dismissing the application with no order as to costs:

(1) Section 307 expressly provided an avenue for an interested party to apply to set aside a dissolution order. Nevertheless, the plaintiff's application should have been filed in the winding up suit and not through a fresh

action as he was essentially challenging the order pronounced by the court in the winding up suit. Furthermore, it was more convenient for the application to be heard in the winding up suit as the relevant cause papers and documents that have been filed were easily accessible and conveniently referred to. The plaintiff's application on this ground alone, must fail. Even though an application under s 307 of the CA should be proceeded with an application under s 243 to stay the winding up order, due to the primary objective of winding up was for a full realisation of the company's assets for the benefit of the interested parties and the fact that the plaintiff's dissatisfaction was that there was an incomplete appreciation and disposal of the company's assets, the stay was unnecessary (see paras 32, 32, 36 & 40–41).

(2) Tanjung Tropika and Sri Alam Sdn Bhd had offered to purchase the land and were invited to submit their tender. However, only the bank had submitted a bid for the land. The defendant had clearly chosen to act transparently in conducting the sale by way of tender. The facts showed that the plaintiff had knowledge of the sale of the land eight years before making the fresh application. The plaintiff's delay in taking action when he realised that the land was sold way below the fair market value, as he claimed, proved to be fatal. There were various avenues available to the plaintiff under the CA that the plaintiff could have and should have taken if he clearly felt aggrieved back then (see paras 44, 47–48, 50 & 55–56).

(3) The plaintiff did not present any documents or cogent materials for the court to consider. While the defendant apparently did have the contract documents pertaining to the share sale, it came to the conclusion that the contract was not enforceable. Nevertheless, none of the contract documents were produced or explained to the court for its consideration. In any event, the plaintiff had himself to be blamed, as he had omitted the details of the alleged share sales in the statement of affairs setting out the company's assets and creditors as required under s 234 of the CA (see paras 59, 62 & 64).

(4) If the plaintiff had included the details pertaining to the Malaysian Batik shares in the statement of affairs, it would have been incumbent on the defendant to investigate and take the necessary action. The plaintiff's omission was self-inflicted and it was too far in the day for the plaintiff to now make the claim and shift the blame on the defendant for not addressing the claim. It would have been different had he made the necessary declaration at the material time and the defendant had failed to attend to it (see paras 66–67).

[Bahasa Malaysia summary

Menurut plaintif, dia telah mengasaskan Sykt Taba Silver Sdn Bhd ('syarikat tersebut') dan adalah mantan pengarah dan pemegang saham syarikat tersebut.

Syarikat tersebut telah digulungkan pada 1992, yang mana defendan telah dilantik sebagai pelikuidasi. Syarikat tersebut mempunyai sebidang tanah ('tanah tersebut') yang dicagarkan sebagai jaminan kepada Bank Pertanian Malaysia ('bank tersebut') untuk pinjaman sebanyak RM750,000. Apabila syarikat tersebut gagal membayar pinjaman, prosiding pelucuthakan dimulakan terhadapnya. Bank tersebut mengarahkan defendan menjual tanah tersebut melalui triti persendirian kepada Galeri Tani Sdn Bhd ('Galeri Tani'). Galeri Tani telah membuat tawaran untuk membeli tanah tersebut untuk RM800,000 dan ini telah dipersetujui oleh defendan. Defendan telah memohon melalui saman dalam kamar untuk persetujuan menjual tanah tersebut. Harga yang ditawarkan oleh Galeri Tani lebih tinggi daripada penilaian yang diberikan oleh Jabatan Penilaian yang hanya RM480,000. Plaintif memohon kebenaran untuk campur tangan dalam prosiding itu. Kedua-dua permohonan oleh defendan dan plaintif kemudian telah ditarik balik dan prosiding pelucuthakan tidak diputuskan. Defendan kemudian memutuskan untuk menjual tanah tersbeut melalui tender. Defendan telah menetapkan harga rizab untuk tanah tersebut pada RM840,000. Hasil daripada jualan tanah tersebut telah digunakan untuk membayar beberapa pemiutang syarikat tersebut. Sepuluh tahun kemudian, defendan telah membuat permohonan dalam guaman penggulungan untuk dilepaskan dan agar syarikat tersebut dibubarkan di bawah s 234 Akta Syarikat 1965 ('AS'). Permohonan itu dibenarkan. Plaintif kemudian telah memfailkan permohonan ini menurut s 307 AS untuk kebenaran memfailkan saman pemula di luar had masa.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

(1) Seksyen 307 dengan jelas memperuntukkan ruang untuk pihak berkepentingan untuk memohon perintah pembubaran diketepikan. Namun begitu, permohonan plaintif patut difailkan dalam guaman penggulungan dan bukan melalui tindakan baru kerana dia mencabar perintah yang diisytiharkan oleh mahkamah itu dalam guaman penggulungan. Tambahan pula, ia lebih sesuai untuk permohonan itu didengar dalam guaman penggulungan kerana kertas kausa dan dokumen relevan yang telah difailkan mudah diakses dan dirujuk. Permohonan plaintif atas alasan ini sahaja, harus gagal. Walaupun suatu permohonan di bawah s 307 AS patut dimulakan dengan permohonan di bawah s 243 untuk menggantung perintah penggulungan, akibat daripada tujuan utama penggulungan adalah untuk merealisasikan sepenuhnya aset-aset syarikat tersebut untuk manfaat pihak-pihak yang berkepentingan dan fakta bahawa ketidakpuasan plaintif adalah bahawa aset-aset syarikat tersebut tidak dinilai dan dijual sepenuhnya, penggantungan adalah tidak perlu (lihat perenggan 32, 32, 36 & 40–41).

(2) Tanjung Tropika dan Sri Alam Sdn Bhd telah membuat tawaran untuk membeli tanah tersebut dan dipelawa untuk mengemukakan tender

mereka. Walau bagaimanapun, hanya bank tersebut telah mengemukakan satu bidaan untuk tanah tersebut. Defendan jelas telah memilih untuk bertindak secara telus dalam melaksanakan jualan itu melalui tender. Fakta menunjukkan bahawa plaintif mempunyai pengetahuan tentang jualan tanah tersebut lapan tahun sebelum membuat permohonan baru. Kelewatan plaintif dalam mengambil tindakan apabila dia menyedari bahawa tanah tersebut telah dijual di bawah nilai pasaran yang adil. Sepertimana yang didakwa olehnya, terbukti memudaratkan. Terdapat pelbagai peluang sedia ada kepada plaintif di bawah AS yang boleh dan patut diambil oleh plaintif jika dia jelas merasa terkilan pada masa itu (lihat perenggan 44, 47–48, 50 & 55–56).

(3) Plaintif tidak mengemukakan apa-apa dokumen atau bahan penting untuk diambil kira oleh mahkamah. Di mana defendan jelas mempunyai kontrak dokumen-dokumen berkenaan jualan saham itu, ia tiba kepada kesimpulan bahawa kontrak itu tidak boleh dikuatkuasakan. Namun begitu, tiada mana-mana daripada kontrak dokumen-dokumen itu dikemukakan atau dijelaskan kepada mahkamah untuk pertimbangannya, dalam apa-apa keadaan, plaintif sendiri patut dipersalahkan, kerana dia telah meninggalkan butiran jualan saham yang dikatakan dalam penyata urusan yang menyatakan aset-aset dan pemiutang-pemiutang syarikat tersebut sepertimana dikehendaki di bawah s 234 AS (lihat perenggan 59, 62 & 64).

(4) Jika plaintif telah memasukkan butiran berkenaan saham Batik Malaysia dalam penyata urusan, ia merupakan kewajipan defendan untuk menyiasat dan mengambil tindakan yang perlu. Peninggalan plaintif telah dilakukan sendiri dan ia terlewat untuk plaintif sekarang membuat tuntutan dan menuduh defendan kerana tidak memberitahu tentang tuntutan itu. Ia mungkin berbeza jika dia telah membuat deklarasi yang perlu pada masa matan dan defendan telah gagal untuk mengambil tindakan terhadapnya (lihat perenggan 66–67).]

Notes

For a cases on disposition of property, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1332–1348.

Cases referred to

Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor [2007] 3 MLJ 571, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779, FC (refd)

Carlson White (M) Sdn Bhd v Mutiara Metropolis Sdn Bhd [1999] 3 MLJ 365, HC (refd)
Coxon v Gorst [1891] 2 Ch 73, Ch D (refd)
Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors (including Can-One International Sdn Bhd as 15th respondent) and other appeals [2010] 6 MLJ 459, CA (refd)
Eastern Investment Co, Ltd, Re [1905] 1 Ch 352, Ch D (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)
Spottiswoode, Dixon & Hunting Ltd, Re [1912] 1 Ch 410, Ch D (refd)
Timberland Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq), Re (1979) 4 ACLR 259, SC (refd)

Legislation referred to

Companies Act 1965 ss 234, 243, 236, 236(2)(c), 239(d), 279, 300(1), 307, 307(1)

Syed Zakaria bin Syed Zainal Abidin (Syed Ibrahim & Co) for the plaintiff.
Siti Zaleha bt Azizi (Official Receiver, Department of Insolvency Malaysia) for the defendant .

Mohamed Zaini Mazlan JC:

INTRODUCTION

[1] The plaintiff's application, made pursuant to s 307 of the Companies Act 1965('the CA 1965'), had sought for leave to file this originating summons out of time, and if granted, for an order:

(a) that the dissolution order of Syarikat Taba Silver Sdn Bhd ('the company'), granted in the Shah Alam High Court Winding-Up Suit No 28–69 of 1992 on 15 June 2010, be made void; and

(b) to reinstate the company in the register of the registered companies of Malaysia.

[2] Section 307(1) of the CA 1965 states as follows:

> 307 Power of court to declare dissolution of company void
>
> (1) Where a company has been dissolved the Court may, at any time within two years after the date of dissolution, on application of the liquidator of the company or of any other person who appears to the Court to be interested, make an order upon such terms as the Court thinks fit declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

[3] In support of his application, the plaintiff contends the following:

(a) that the disposal of the company's land by the defendant, was grossly undervalued; and

(b) the defendant had failed to pursue the company's interests in respect of the sale of Sykt Malaysia Batik Handicraft Sdn Bhd's ('Malaysia Batik') shares, as the company owns 80% of the shares in the latter.

[4] In essence, the plaintiff contends that the company still has interests that were not, or have not been attended to satisfactorily.

THE SALIENT FACTS

The plaintiff

[5] The plaintiff claims to have founded the company back in 1978. He was also a former director and shareholder of the company.

[6] He was adjudged a bankrupt through a bankruptcy suit at the Kuala Lumpur High Court, in Suit No 29–615 of 1991. He claims that he is no longer a bankrupt, and that he has the locus standi to commence this suit.

The company

[7] The company was wound-up pursuant to a petition by Affin Finance Bhd on 8 October 1992, at the Kuala Terengganu High Court, in Companies Winding-Up No 28–8 of 1991. The defendant was appointed the liquidator. On the same day, the suit was transferred to the Shah Alam High Court, and registered as MTSA 28-69 of 1992 ('the winding up suit').

[8] The company owned a piece of land in Pasir Mas, Kelantan. This land was charged to Bank Pertanian Malaysia ('the bank') in 1988, as security for a loan given to the company. The loan then was for RM750,000.

The foreclosure proceedings and the land

[9] The company failed to honour its obligation towards the loan. The bank commenced foreclosure proceedings at the Kota Bharu High Court sometime in 1995, and obtained an order for sale on 9 July 1995.

[10] The bank was not inclined to proceed with an auction. It had instead, sought the defendant's consent to sell the land by way of private treaty, to a company called Galeri Tani Sdn Bhd ('Galeri Tani'), as the latter had offered to buy the land for RM800,000.

[11] At first, the defendant was not keen on the bank's proposal, as the bank had already obtained an order for sale. The defendant subsequently acquiesced to the bank's repeated request.

[12] The bank proceeded to file an application to annul the order for sale in April 1997. This application was allowed on the 12 May 1997.

[13] The defendant then filed an application through a summons in chambers dated 6 September 1997, for consent to sell the land to Galeri Tani for RM800,000. In the application, the defendant named itself as an applicant, the bank as the first respondent, and Galeri Tani as a second respondent.

[14] In its application, the defendant claims that the offer by Galeri Tani was significantly higher than the valuation given by the 'Jabatan Penilaian dan Perkhidmatan Harta Negeri Kelantan' on the 12 September 1993, which was only RM480,000.

[15] The plaintiff had in turn, filed an application for leave to intervene, through a summons in chambers dated 7 February 1998. In his application, the plaintiff raised some cogent issues, such as the validity of the nullification of the order for sale, the correctness of the defendant's mode of application, and the fact that the bank had never obtained leave from the winding up court to commence the foreclosure proceedings.

[16] The plaintiff also contended that a company called Sykt Tanjung Tropika Sdn Bhd ('Tanjung Tropika'), had offered to purchase the land for RM3,870,000, and that the defendant had not considered it, despite his repeated requests.

[17] Both applications were however eventually withdrawn in early 1998.

[18] The foreclosure proceedings never reached its conclusion. The defendant eventually decided to sell the land by way of tender, and had informed the bank through its letter dated 24 August 1998.

The tender

[19] The defendant had obtained another valuation of the land from the Kota Bharu division of the 'Jabatan Penilaian & Perkhidmatan Harta' on the 31 May 1997, who had valued the land at RM840,000. This price was significantly higher than the value given back in 1993, which was RM480,000. The defendant when carrying out the tender exercise, had set the reserve price at RM840,000.

[20] The land was eventually sold sometime in February 1999, by way of a private tender for RM840,000. The plaintiff claimed that it was sold to Galeri Tani. The fact shows that it was sold to the bank, which incidentally was the only one that had made an offer.

The company's dissolution

[21] The proceeds from the sale of the land enabled the defendant to declare dividends, which was used to pay some of the company's creditors.

[22] Some 10 years later, the defendant proceeded to make an application in the winding up suit to be released, for the company to be dissolved under s 239(d) of the CA 1965, and for the company's books and papers to be destroyed. This application was granted on 15 June 2010.

THE PLAINTIFF'S APPLICATION

The preliminary objection

[23] The defendant had initially raised a preliminary objection. It was contended that the plaintiff is barred from filing this application, as s 307 of the CA 1965 states that an application to declare the dissolution of a company as void, must be made within two years from the date of dissolution.

[24] This objection was initially heard, and dismissed by Vernon Ong J (as he then was), on 21 May 2014. Parties were directed to file written submissions in respect of the substantive application.

[25] In the case of *Carlson White (M) Sdn Bhd v Mutiara Metropolis Sdn Bhd* [1999] 3 MLJ 365, the respondent's application under s 307 of the CA 1965 was dismissed, as it was filed beyond the two year period prescribed in the section. However, it was not mentioned, whether the applicant had attempted to justify the delay.

[26] In this case, the plaintiff did justify his delay. He stated that he had only come to know of the company's dissolution, through the defendant's letter dated 7 May 2013.

[27] Similarly in *Re Spottiswoode, Dixon & Hunting Ltd* [1912] 1 Ch 410, the applicant's explanation for the delay in filing its application was accepted.

[28] The court, as with most applications that sets a time period, has the discretionary power to allow an application made beyond the two year period. However, the applicant will need to provide convincing reasons for the delay.

[29] In the *Carlson White* case, it was also suggested that an application under this section should be preceded with an application under s 243 of the CA 1965 to stay the winding up order. The plaintiff here did not make such an application.

[30] In my considered view, there is no necessity to obtain a stay in every application, if for instance, the primary objective is to seek for a full realisation of the company's assets for the benefit of interested parties.

[31] I am fortified in my view with the case of *Coxon v Gorst* [1891] 2 Ch 73. Chitty J had in that case said this:

> The object of the action is to recover assets of the late company alleged not to have been got in pending the winding up, and to have such assets distributed among the Plaintiff and the others on whose behalf he is suing. In other words, it is an action for a further and complete winding up of the affairs of the company.

[32] In this case, the plaintiff's dissatisfaction is essentially with what he alleges to be an incomplete appreciation, and disposal of the company's assets.

FINDINGS

[33] The two broad grounds that the plaintiff has raised in support of his application concerns the sale of the land, and the Malaysia Batik shares.

Whether the application was flawed

[34] Prior to deliberating the substantive grounds raised by the plaintiff, I had raised the issue of whether the plaintiff's application was flawed from the start, and had invited counsel for both parties to address me on this issue. However, both counsel may have misconstrued my query, and submitted on the mode of this application. I had meant for counsel to submit as to whether this application should have been filed in the winding up suit, which was certainly not the case here.

[35] There is a long line of established cases pertaining to collateral proceedings, or fresh actions taken in order to challenge the order made by a court of concurrent jurisdiction; see the leading case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC), and the comprehensive discussion by the Court of Appeal's recent decision in *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779.

[36] There is however a slight distinction in this case, as s 307 of the CA

A 1965 expressly provides an avenue for an interested party to apply to set aside a dissolution order. Nevertheless, it is my considered opinion, that the plaintiff's application should have been filed in the winding up suit, and not through a fresh action, as he is essentially challenging the order pronounced by the court in the winding up suit.

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[37] The court referred to under s 307 of the CA 1965, must refer to the winding up court.

C **[38]** Azmi FCJ in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 held:

> lt is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which
D was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction ... (at p 409-A).

[39] His Lordship Peh Swee Chin, in the same case, had this to say:

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> lt is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for
F applying to have it set aside first. When one wishes to file such proceedings to so set it aside, must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank v Sahari bin Murid*, as mentioned later in this judgment in connection with a consent judgment (at pp 417-1 and 418-A).

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[40] Furthermore, it would be more convenient for the application to be heard in the winding up suit, as the relevant cause papers and documents that have been filed, would be easily accessible and conveniently referred to.

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[41] The plaintiff's application on this ground alone, must fail.

[42] I had nevertheless for completeness, considered the grounds set out in the plaintiff's application.

I

The sale of the land

[43] The plaintiff contends that the defendant had sold the land way below its actual value. He asserts that the defendant should have sold the land to

Tanjung Tropika, who had offered to purchase the land for RM3,870,000. He also stated that another company named Sri Alam Sdn Bhd had also indicated its interest.

[44] The defendant did not dispute the fact that both Tanjung Tropika and Sri Alam had made an offer to purchase the land. However, the defendant asserts that these companies have indeed been invited to submit their tender.

[45] I have perused the notice of tender and found for a fact, that the notice of tender, was amongst others, addressed to Tanjung Tropika and Sri Alam. There is no evidence to suggest that these two companies did not receive any notification of the notice of tender, save for the plaintiff's bare allegation.

[46] The defendant contends that it had decided to sell the land by way of tender, to ensure that the sale was done above board. The defendant, empowered under s 236, and in particular s 236(2)(c) of the CA 1965, is perfectly entitled to do this.

[47] Apparently, the bank was the only one that submitted a bid. This is an undisputed fact.

[48] The defendant could have opted to sell the land by way of a private treaty, as attempted previously. In conducting the sale by way of tender, the defendant had clearly chosen to act transparently.

[49] The plaintiff also asserts, that the defendant did not inform him of the steps that it had taken to sell the land, and that he only got notice of it, when he received a letter from the defendant dated 8 August 2006. This letter was in reply to the plaintiff's letter dated 17 July 2006.

[50] On this fact alone, it is evident that the plaintiff had knowledge of the sale of land eight years prior to making this application. He could have taken steps pursuant to s 279 of the CA 1965.

[51] A similar situation arose in the case of *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571. The applicant in that case, was also a contributory and director of the company. The liquidator had sold a land belonging to the company through a tender. This land was also charged to a bank. However, unlike this suit, the plaintiff's application was for among others, an order to set aside the sale of the land. One of the grounds put forward by the plaintiff, was that the land was sold at a grossly undervalued price.

[52] In dismissing the plaintiff's application, His Lordship Ramly Ali J (as he then was), relied on the Court of Appeal's decision in *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662, and quoted a passage from that case: 'the true commercial value of a property is not what a valuer thought it should be but the actual price that the property would fetch on the open market'.

[53] His Lordship also held, that the Court of Appeal's decision in that case, is authority for the proposition that an applicant cannot make a complain without having taken any action, or provide any proof that the liquidatorhad acted fraudulently or unreasonably.

[54] This same proposition was stated in the *Coxon* case and *Re Eastern Investment Co Ltd* [1905] 1 Ch 352.

[55] I am also of the view, that the plaintiff's inaction for a lengthy period of time is fatal. It would be inequitable, if the delay is excused without any convincing reasons. I must qualify that the delay here is the failure to take action, when he realised that the land was sold way below the fair market value, as he claims, and not the delay in filing this application.

[56] There are various avenues that were available to the plaintiff under the CA 1965, which I shall not elaborate. The plaintiff could have, and should have done something if he clearly felt aggrieved back then.

[57] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, Gopal Sri Ram JCA (as he then was), held:

> lt is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion. (at p 229, D-F)

Malaysia Batik shares

[58] The plaintiff claims that the company owned 80% of the shares in Malaysia Batik and another company called Handicraft Sdn Bhd. Malaysia

Batik, according to the plaintiff, owns shares in Craftsmen Enterprise Sdn Bhd. The plaintiff claims that there is a sale price of RM46,904 due to the company.

[59] These claims by the plaintiff are just bare assertions. Save for what he has asserted, there are no documents or cogent materials presented for me to consider.

[60] All that the plaintiff has exhibited, is a letter from the defendant to the Ministry of Finance Malaysia dated 7 May 2013. This letter was written pursuant to a meeting held at the Ministry of Finance on 18 March 2013. The defendant had in that letter, sought to explain the steps that it had taken prior to the dissolution of the company.

[61] In respect of the Malaysia Batik shares, the defendant stated that the plaintiff had never given them any information pertaining to the alleged sale of shares, and that it did not have any prior knowledge.

[62] Apparently, the defendant had in its possession, the contract documents pertaining to this sale, although it was not mentioned as to when it was given to them. Nevertheless, the defendant had perused the contents of these documents, and came to the conclusion that the contract was not enforceable.

[63] I shall not attempt to analyse the defendant's reasoning as to why the share sale contract was not enforceable, as I am handicapped with the fact that none of the contract documents were produced or explained for my consideration.

[64] In any event, I agree with the defendant's contention that the plaintiff has himself to be blamed, as he had failed to omit the details of the alleged share sales in the statement of affairs that he had submitted on 16 May 1997. The plaintiff had only declared the debts owing to Affin Finance Sdn Bhd and Public Bank in the statement of affairs.

[65] It is a requirement under s 234 of the CA 1965 for the plaintiff, as the founder, officer and contributory of the company, to submit a statement of affairs, setting out amongst others, particulars of the company's assets and creditors. In fact, a failure to declare any debts owing to the company in the statement of affairs, could amount to an offence under s 300(1) of the CA 1965.

[66] If the plaintiff had included the details pertaining to the Malaysia Batik shares in the statement of affairs, it would have been incumbent on the defendant to investigate and take any necessary action.

[67] The plaintiff's omission is self-inflicted. It is far too late in the day for him to now make the claim, and shift the blame on the defendant for not addressing the claim. It would have been different had he made the necessary declaration at the material time, and that the defendant had failed to attend to it.

CONCLUSION

[68] An official receiver, being duly appointed by the court, is an officer of the court. With that comes great responsibility. A high standard of honesty, impartiality and diligence is expected of them.

[69] The duties of a liquidator have been set out comprehensively in *Re Timberland Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq)* (1979) 4 ACLR 259. In essence, some of them are as follows:

(a) to enhance the disposable assets of the company;

(b) to make himself thoroughly acquainted with the affairs of the company, and not to suppress and conceal anything from the shareholders, the creditors and the court; and

(c) to administer the assets of the company honestly, for the benefit of the creditors and shareholder.

(at pp 281–282).

[70] It was further stated in the *Timberland* case:

> the decisions the liquidator makes from time to time are in effect made under the authority of the court itself. The winding up is by the court which for the purposes the liquidator is. As such he is entrusted with the reputation of the court for impartial and proper dispatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge. When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration (at p 286).

[71] The *Timberland* case was referred to and cited with approval by our Court of Appeal in *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors (including Can-One International Sdn Bhd as 15th respondent) and other appeals* [2010] 6 MLJ 459.

[72] The grounds that the plaintiff has set out, is in effect, an attack on the defendant's acts, or the lack of them. He must therefore present convincing and compelling evidence. With respect, he has not done so.

[73] The plaintiff's application is therefore dismissed. However, I make no order as to costs.

Application dismissed with no order as to costs.

Reported by Afiq Mohamad Noor